United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term 1964

No. 18,808

MAURICE N. WHITTINGTON

Appellant

v.

DALE C. CAMERON, M.D.
Superintendent of Saint
Elizabeth's Hospital

Appellee

876

On Appeal In Forma Pauperis From
The United States District Court
For the District of Columbia

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STATEMENT OF QUESTIONS PRESENTED

1. Does the failure of a Federal Officer to respond to an order requiring him to show cause why a Writ of Habeas Corpus should not issue, subject him to the forfeiture penalty provided by Title 16 District of Columbia Code, section 804?

2. Does the failure to produce a detained person, for whom a Writ of Habeas Corpus has been issued, directed to the Federal officer who had Custody of the prisioner when application for the Writ was made, who had custody of the Petitioner when the Writ was issued and who had knowledge of the issuance of the Writ, but who transferred Petitioner out of his custody before actual service of the Writ was effected, subject that officer to the forfeiture provisions of Title 16, District of Columbia Code, section 804.

3. Does the willful transfer of a prisioner out of the custody of a Federal officer for the purpose of erading a Writ of Habeas Corpus, subject that officer to the forfeiture provisions of Title 16, District of Columbia Code, section 804.

4. Under the circumstances herein involved, was Appellant entitled to a trial on the merits?

5. Should Defendant-Appellee's Motion to Dismiss, which presented matters outside the Complaint which the Court did not exclude, have been treated as a Motion for Summary Judgment, as required by Rule 12(b), Federal Rules of Civil Procedure?

6. Should the Court, having allowed the Plaintiff-Appellant to proceed in forma Pauperis under Title 28 United States Code, section 1915 have granted the pauper a transcript of the Habeas Corpus proceedings for use in this related action to recover a forfeiture under Title 16, District of Columbia Code, section 804.

MAURICE N. WHITTINGTON

Appellant

vs.

DALE C. CAMERON, M. D.
Superintendent of St.
Elizabeth's Hospital

Appellee

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JURISDICTIONAL STATEMENT

This is an action to recover a forfeiture under District of Columbia Code (1951 Ed) Title 16, section 804, brought upon a Complaint filed December 6, 1963, in the United States District Court for the District of Columbia, J A Jurisdiction of that Court is conferred by United States Code, Title 28, section 1355.

A Motion to Dismiss on the ground the complaint failed to state a claim upon which relief could be granted, was granted in favor of the Defendant-Appellee on April 16, 1964. JA . Plaintiff-Appellant's Motion for leave to proceed on appeal in forma pauperis was granted by this Court on July 22, 1964.

This Court has jurisdiction under 28 U. S. Code 1291.

STATEMENT OF THE CASE

On Wednesday, September 19, 1961, Appellant, who was a patient in Saint Elizabeth's Hospital, filed a pro se Application for a Writ of Habeas Corpus in the United States District Court for the District of Columbia, directed to the Appellee, Superintendent of Saint Elizabeth's. JA

An Order to show cause why the Writ should not issue was made returnable in seven (7) days and served upon the Appellee, Superintendent of Saint Elizabeth's on Friday, September 21, 1962. No return to the show cause order was made by Friday, September 28, 1962 and the Writ of Habeas Corpus was issued on October 1, 1962 and served Tuesday, October 2, 1962, returnable Monday, October 8, 1962.

The Appellee, Superintendent, instead of making return to the order, recommended transfer of the Appellant to District of Columbia Jail on September 27, 1962. The Appellant was so transferred on Monday, October 1, 1962 and on that same day, Appellee made return, three (3) days late, to the Order to show cause. The Writ issued, however, and when the return day, October 8, 1962 arrived, the Appellee failed to produce the Appellant, because he had deliberately

transferred the Appellant, in order to evade the command of the Writ.

The Appellant then instituted a civil action to recover a forfeiture provided by 16 D. C. Code, section 804, and filed an application for a transcript of the Habeas Corpus proceedings, WHITTINGTON v. CAMERON, H. C. 391-62. Application for transcript was denied and Appellee filed a Motion to Dismiss which was granted. This Appeal followed.

STATUTES INVOLVED

1. 28 U. S. C. 1915

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefore, by a person who makes affidavit that he is unable to pay such costs or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

(b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The Court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States. (June 25, 1948, C. 646, sec. 1, 62 Stat. 954, May 24, 1949, C. 139, sec. 98, 63 Stat. 104; Oct. 31, 1951, C., 655, sec. 51(b), (c), 65 Stat. 727; Sept. 21, 1959, P. L. 86-320, 73 Stat. 590.

2. 28 U. S. C. 1291

The courts of appeals shall have jurisdiction of appeals from all final dicisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. (July 25, 1948, C. 646, 62 Stat. 929; Oct. 31, 1951, C. 655, sec. 48, 65 Stat. 726; July 7, 1958 Pub. L. 85-508, sec. 12(e), 72 Stat. 348).

3. 28 U. S. C. sec. 1355

The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress. June 25, 1948, C. 646., 62 Stat. 934.

4. 28 U. S. C. Federal Rules of Civil Procedure, Rule 12(b).

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process; (6) failure to state claim upon which relief can be granted, (7) failure to join an indispensible party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If on a motion asserting the defense

numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 56

(a) For Claimant. A party seeking to recover upon a claim, counter claim or crossclaim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. (As amended Dec. 27, 1946, effective March 19, 1948)

(b) For Defending Party. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceeding Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. (As amended Jan. 21, 1963, eff. July 1, 1963.)

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion; by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Futher Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn a certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. (As amended Jan. 21, 1963, eff. July 1, 1963)

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may

order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

5. 16 D. C. Code 803

On any application for a writ of habeas corpus, if probable cause be shown for believing that the person charged with confining or detaining the person applying or on whose behalf the application is made is about to remove the person so detained from the place where he may then be, for the purpose of evading any writ of habeas corpus or for other purposes, or that he would evade or not obey any such writ, the court or judge shall insert in the writ a clause commanding the marshal to serve the writ on the person to whom it is directed and cause said person immediately to be and appear before the court or judge, together with the person so confined or detained and it shall thereupon be the duty of the marshal immediately to carry the person charged with the detention, together with the person detained, before the court or judge, and said court or judge shall proceed to inquire into the matter. (Mar. 3, 1901, 31 Stat. 1372, ch. 854. 1145; June 25, 1948, 62 Stat. 991, ch. 646, 32(a); May 24, 1949, 63 Stat, 63 Stat. 107, ch. 139, & 127.)

STATEMENT OF POINTS

1. The failure of a Federal officer to answer an order to show cause why a Writ of habeas corpus should not issue, subjects said officer to the forfeiture provision of 16 D. C. Code 804.

2. The failure of a Federal officer to produce a detained person in his custody in compliance with the command of a Writ of habeas corpus because said officer, after the issuance of the Writ, with knowledge that the writ had issued, but before actual service of the writ, transferred the person detained out of his custody, subjects that officer to the forfeiture provision of 16 D. C. Code 804.

3. The willful and deliberate transfer of a person out of custody of a Federal Officer, so as to evade a Writ of Habeas Corpus, after the Writ has been issued but before it has been served, when the officer has knowledge and notice of the proceedings, by reason of the fact that he was served with a show cause order to which he failed to make timely return, subjects that officer to the provisions of 16 D. C. Code 804.

4. Under the circumstances of the instant case, where the evidence tends to show that Appellant's transferral from

Appellee's custody was accomplished to avoid and evade a Writ of Habeas Corpus, Appellant was entitled to a trial on the merits, to determine whether Appellee is liable to him on a forfeiture provided by Act of Congress.

5. The District Court should not have granted Appellee-Defendant's Motion to Dismiss on the ground the Complaint failed to state a claim upon which relief could be granted, because the Complaint does state a valid statutory cause of action on its face, and Defendant's - Appellee's Motion introduced matters outside the Complaint which the Court did not exclude. Accordingly, Defendant's Appellee's Motion should have been treated as a Motion for Summary Judgment and heard according to the provisions of Rule 56, Federal Rules of Civil Procedure. Defendant-Appellee's Motion was not so treated, but was granted summarily, and such dismissal error.

6. The District Court should not have denied the Appellant, then Plaintiff, a transcript of the Habeas Corpus proceedings, for use as evidence in his civil action to recover a forfeiture provided by act of Congress, because the civil action was only allowed after determining that a good cause of action existed, and then to deny a pauper the means to prove his claim, is to deny that claimant his right to Due Process of Law as guaranteed by the Fifth Amendment of the United States Constitution.

SUMMARY OF ARGUMENT

1. The failure of a Federal officer to make return of an order to show cause why a Writ of Habeas Corpus should not issue, subjects said officer to the forfeiture provisions of 16 D. C. Code 804.

2. The failure of a Federal officer to produce a detained person in compliance with the command of a Writ of Habeas Corpus, because said officer, after an Order to show cause why the Writ should not issue had been served upon him, had transferred the person detained out of his custody, subjects that Federal officer to 16 D. C. Code, 804.

3. The willful and deliberate transfer of a detained person out of the custody of a Federal officer, so as to evade a Writ of Habeas Corpus, after the Writ has been issued but before it has been served, when the Federal office has knowledge and notice of the proceedings, by reason of the fact that he was served with a show cause order to which he failed to make timely return, subjects that Federal officer to the provisions of 16 D. C. Code, 804.

4. Under the circumstances of the instant case, where the evidence tends to show that Appellant's Transferral from Appellee's custody was accomplished to avoid and evade a

Writ of Habeas Corpus, Appelant was entitled to a trial on the Merits of determine whether Appellee should be liable to him on a forfeiture provided by act of Congress.

5. The District Court should not have granted Appellee-Defendant's Motion to Dismiss on the ground the Complaint failed to state a claim upon which relief could be granted, because the Complaint does state a valid statutory cause of action on its face, and Defendant-Appellee's Motion introduced matters outside the Complaint which the Court did not exclude. Accordingly, Defendant Appellee's Motion should have been treated as a Motion for Summary Judgment and heard according to the provisions of Rule 56, Federal rules of civil procedure. Defendant-Appellee's Motion was not so treated, but was granted summarily and such dismissal was error.

6. The Court below should have provided the Appellant, proceeding in forma pauperis, a transcript of the Habeas Corpus proceedings and it was error to deny the Appellant such a transcript.

ARGUMENT

1. THE FAILURE OF A FEDERAL OFFICER TO MAKE RETURN OF AN ORDER TO SHOW CAUSE WHY A WRIT OF HABEAS CORPUS SHOULD NOT ISSUE, SUBJECTS SAID OFFICER TO THE FORFEITURE PROVISIONS OF D. C. CODE 804.

Title 16, District of Columbia Code, section 804 provides:

"If any officer or other person to whom a Writ of Habeas Corpus may be directed shall neglect or refuse to make return thereof, or to bring the body of the person detained, according to the command of the Writ, he shall forfeit to the person detained the sum of $500.00 and besides shall be liable to attachment and punishment as for a contempt."

Title 16, District of Columbia Code, section 801 provides:

"Any person committed, detained, confined or restrained from his lawful liberty within the District, under any color or pretense whatever, or any person in his or her behalf, may apply by petition to the United States District Court for the District of Columbia, or any judge thereof, for a Writ of habeas corpus, to the end that the cause of such committment, detainer, confinement or restraint may be inquired into, and the court or the judge applied to, if the facts set forth in the petition make a prima faire case, shall <u>forthwith</u> grant such writ, directed to the officer or other Person in whose custody or keeping the party so detained shall be, returnable <u>forthwith</u> before said Court or judge."

As indicated by the emphasis supplied above, the law provides the writ shall issue "forthwith" and shall be returnable "forthwith".

The practice of issuing an "order to show cause" why

the writ should not issue, has grown up, however, and has been countenanced by the United States Supreme Court in Walker v. Johnson (1941-year), 312 U. S. 275, 61 S. Ct. 574, 85 L. Ed. 830, so long as it "deprives the petitioner of no substantial right". 312 U. S. 284.

The Appellant maintains that since the practice of issuing an order to show cause has arisen and received approval, where the statute specifically says "the writ shall issue forthwith" that a failure to make return to the Order to show cause, should be considered as a failure to answer the writ and punishable as provided for in 16 District of Columbia Code, section 804.

Another circuit has held:

"An actual hearing on an order to show cause why a Writ of Habeas Corpus should not be issued is the equivalent of a hearing after the issuance of the Writ." King v. Smith (Wash. Circ. 1946) 15B F 2d 715.

State Courts, construing statutes almost identical the District of Columbia rules, have said:

"When the petition, duly verified, shows on its face that the Petitioner was illegally restrained of his liberty and the sheriff who has the Petitioner in custody has failed to make a return (to a rule to show cause why the Writ should not issue), this court may proceed in a summary way to determine the cause and order the Petitioner discharged upon the verified and undenied petition filed herein." Ex Parte Hawkins, 70 Okl. Crim, 246, 105, P(2) 1113, 1940; Ex Parte Hastings, 70 Okl. Crim.

128, 105P(2), 270, Ex Parte Murphy, 65, Okl. Crim. 245, 84 P (2) 806.

The pertinent Oklahoma statute 12 Okl. St. Ann sec. 1338 (1931) provides:

"The sheriff or other person to whom the Writ is directed shall make immediate return thereof, and if he neglect or refuse, after due service to make return, or shall refuse or neglect to obey the Writ by producing the party named therein, and no sufficient excuse be shown for such neglect or refusal, the Court shall enforce obedience by attachment."

This law, which is substantially the same as the rule here in the District of Columbia, except for the local provision for the forfeiture penalty, has been construed to treat a failure to make return to an order to show cause the same as a failure to answer a Writ.

The Appellant therefore urges this Court to construe the District of Columbia statute in the same manner as Oklahoma Courts have construed their statute and award the Appellant the damages complained of because:

"... A statute imposing a forfeiture should be construed strictly, and in a manner as favorable to the person whose property is to be siezed as in consistent with the fair principles of interrpetation.

"However, the courts will not rewrite the clear provisions of a statute under the guise of construing it. They are to be fairly and reasonally construed so as to carry out the legislative intent, and an attempt will be made to give effect to each provision of the statute." 37 C. J. S., section 4, (citations omitted).

2. THE FAILURE OF A FEDERAL OFFICER TO PRODUCE A DETAINED PERSON IN COMPLIANCE WITH THE COMMAND OF A WRIT OF HABEAS CORPUS, BECAUSE SAID OFFICER, AFTER AN ORDER TO SHOW CAUSE WHY THE WRIT SHOULD NOT ISSUE HAD BEEN SERVED UPON HIM , HAD TRANSFERRED THE PERSON DETAINED OUT OF HIS CUSTODY, SUBJECTS THAT FEDERAL OFFICER TO 16 D. C. CODE, 804.

As indicated previously, orders to show cause, when application has properly been made for a Writ of Habeas Corpus, are allowed so long as they "deprive the petitioner of no substantial right" Walker v. Johnson, op. cit.

A brief review of the chronological sequence of events indicates that Appellant was deprived of substantial rights by the actions and non-actions of the Appellee.

On Wednesday, September 19, 1962 the Appellant, then Petitioner, filed his Petition for a Writ of Habeas Corpus. An order to show cause why the writ should not issue was directed to the Superintendent of Saint Elizabeth's Hospital, returnable within seven (7) days after service was effected Friday, September 21, 1962. No return was made by September 28, 1962 and the Writ was issued and served Tuesday, October 2, 1962, returnable Monday, October 8, 1962. The Superintendent, having been served with the order to show cause on September 21, 1962, rather than make return on September 28, 1962, instead recommended transferral of the

Petitioner (Appellant). The Petitioner (Appellant) was so transferred to D. C. Jail on Monday, October 1, 1962 and the Superintendent of St. Elizabeth's made return, 3 days late, to the Order to Show Cause. The Writ issued however, and when the return day, October 8, 1962 arrived, the Respondent (Appellee) failed to produce the petitioner, because he had deliberately, knowingly, and in order to avoid a hearing, transferred the Petitioner (Appellant) to the D. C. Jail.

Had the Appellant been aware of the Appellee's intentions he would have availed himself of 16 D. C. Code, section 803, which provides a remedy if it is believed the person charged with possession is about to remove or cause to be removed, the person so detained, for the purpose of evading the writ. Since section 803 & 804 are obviously written to supplement each other, one a remedy prior to evasion, one subsequent, and since, had he known of the Appellee's intention; Appellant could have availed himself of the former, he should, since the Appellee did fail to comply with the command of the Writ, be allowed now to avail himself of the latter remedy.

The Appellee's defense, that Appellant was not within his custody when the actual Writ was issued is spurious, since

Appellee knew of the Writ, failed to timely answer an order to show cause, but only answered it after he had arranged to transfer Appelant out of his custody in a deliberate attempt at evasion, and did deliberately seek Appellants transfer and removal to evade the Writ.

3. THE WILLFUL AND DELIBERATE TRANSFER OF A DETAINED PERSON OUT OF THE CUSTODY OF A FEDERAL OFFICER, SO AS TO EVADE A WRIT OF HABEAS CORPUS, AFTER THE WRIT HAS BEEN ISSUED BUT BEFORE IT HAS BEEN SERVED, WHEN THE FEDERAL OFFICER HAS KNOWLEDGE AND NOTICE OF THE PROCEEDINGS, BY REASON OF THE FACT THAT HE WAS SERVED WITH A SHOW CAUSE ORDER TO WHICH HE FAILED TO MAKE TIMELY RETURN, SUBJECTS THAT FEDERAL OFFICER TO THE PROVISIONS OF 16 D. C. CODE, 804.

The clear intent of 16 D. C. Code, sections 801 et seq. is to insure that a person detained who has made proper application to the Court for a Writ of Habeas Corpus alleging that his confinement is unlawful, is entitled to a hearing or at the very least a review of his petition. Since the practice of issuing show cause orders in lieu of immediately issuing a Writ has evolved and received Supreme Court approval so long as it "deprives the petitioner of no substantial right", a procedure not provided for in the statute has become the usual practice. While this procedure is generally acceptable, the courts have not defined the applicability of the remedial provisions of 16 D. C. Code 804 to causes arising under this situation. We are left with the opportunity for Federal officials to flaunt the entire purpose of the Habeas Corpus statutes, if the remedial provisions of 16 D. C. Code, section 804 are not construed to be applicable, by the simple expedient of neglecting

or ignoring a show cause order, and transferring the petitioners out of their custody, ad infinitum, from Lorton to St. Elizabeth's to D. C. Jail, and around the cycle again. The petitioner could be forever deprived of his rights to a judicial determination of the legality of his confinement. Once out of custody of one Federal officer the Writ is dismissed and no appeal lies.

Accordingly, in view of the obvious intent of this legislation, and to supplement the provisions of 16 D. C. codes section 803, which provide a deterent to evasion before transferral occurs, section 804, must be construed, where a show cause order has been served and ignored, and a detained person transferred before the Writ is served on the Federal officer, to provide a remedy to the petitioner. Otherwise he can be totally deprived of his right to a judicial inquiry into the legality of his confinement. This would certainly deprive the petitioner of a substantial right and therefore be an exception to the approval given by the Supreme Court to the practice of issuing show cause orders in lien of issuing the Writ "forthwith".

4. UNDER THE CIRCUMSTANCES OF THE INSTANT CASE, WHERE THE EVIDENCE TENDS TO SHOW THAT APPELLANT'S TRANSFERRAL FROM APPELLEE'S CUSTODY WAS ACCOMPLISHED TO AVOID AND EVADE A WRIT OF HABEAS CORPUS, APPELANT WAS ENTITLED TO A TRIAL ON THE MERITS TO DETERMINE WHETHER APPELLEE SHOULD BE LIABLE TO HIM ON A FORFEITURE PROVIDED BY ACT OF CONGRESS.

Appellee has forfeited all reliance on the ground of good faith by reason of his failure to timely answer the order to show cause, and in fact, the inference of bad faith is clamorous from the unlikely coincidence of Appellee's determination of Appellant's restoration with the date on which return was to be made, and the subsequent hasty transferral of the Appellant, while knowing the aforesaid proceedings were pending.

The intent of Congress was clearly to provide a remedy for evasion of the Writ. Appellant, therefore, should have had a trial on the merits since Appellee did evade the Writ and such evasion, the facts tend to show, was deliberate and willful. The Appellant has no other relief.

The Appellant orginally petitioned the United States District Court for the Eastern District of Virginia, for a Writ of Habeas Corpus directed to his custodian at Lorton. The petitioner was transferred to St. Elizabeth's Hospital on the ground he suffered a "persecution complex". The Petition was dismissed.

Appellant filed an application for a Writ of Habeas Corpus in the United States District Court for the District of Columbia directed to the Superintendent of St. Elizabeth's Hospital on the ground that he was not committed to that institution in accordance with the laws of the District of Columbia, in that, among other things, he was not examined by a psychiatrist before his committal. It was this petition which generated the show cause order directed to Appellee. Appellee failed to make timely return, and Appellant was, instead, transferred to D. C. Jail. Now the issue of his confinement in St. Elizabeth's Hospital is moot. But Appellant's rights it seems, have been trampled upon by the high-handed tactics of the Federal officials involved. Congress provided a remedy for failure to respond to a Writ. But the statute also provides the Writ shall issue forthwith. The practice of issuing show cause orders, not provided for by statute, but contenanced by the Supreme Court, so long as they deprive the petitioner of no substantial right, has opened a gap in our provisions for securing a petitioner a hearing on a just claim of unlawful detention. Such a gap in our remedial legislation, however, would deprive a petitioner of a substantial right, and thus remove the approval of the Supreme

Court from the action of issuing a show cause order instead of issuing the Writ forthwith. Accordingly, the order to show cause, in the instant case should be considered as a Writ, or the Appellee's failure to respond, coupled with transferral of the Prisoner, should be considered to fall within the activity prescribed by section 804, and the forfeiture should be ordered.

In any event, the actions of the Appellee merit close scruting by the Court and the question of the applicability of 16 D. C. Code, 804 should have been treated in a full hearing on the merits, because of the circumstances involved.

5. THE DISTRICT COURT SHOULD NOT HAVE GRANTED APPELLEE-DEFENDANT'S MOTION TO DISMISS ON THE GROUND THE COMPLAINT FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED, BECAUSE THE COMPLAINT DOES STATE A VALID STATUTORY CAUSE OF ACTION ON ITS FACE, AND DEFENDANT-APPELLEE'S MOTION INTRODUCED MATTERS OUTSIDE THE COMPLAINT WHICH THE COURT DID NOT EXCLUDE. ACCORDINGLY, DEFENDANT APPELLEE'S MOTION SHOULD HAVE BEEN TREATED AS A MOTION FOR SUMMARY JUDGMENT AND HEARD ACCORDING TO THE PROVISIONS OF RULE 56. FEDERAL RULES OF CIVIL PROCEDURE. DEFENDANT-APPELLEE'S MOTION WAS NOT SO TREATED, BUT WAS GRANTED SUMMARILY AND SUCH DISMISSAL WAS ERROR.

That the Complaint did state a good cause of action is apparent on its face, by a reading of the statutes involved, and by reason of consideration hereinbefore advanced. The Appellee-Defendant's Motion to Dismiss relies on the fact that Appellant was no longer in Appellee's custody when the Writ was served.

But the statute provides a remedy if any officer shall "neglect or refuse to make return", or "to bring the body of the person detained". The statute does not condition its applicability on continuing custody, although lack of custody would obviously be a defense. Whether or not it is a good defense should depend upon an inquiry into the circumstances of the custody or lack of custody, and transferral of custody.

Since the provisions of 16 D. C. Code 801 providing for issuance of a Writ forthwith upon proper application, have been modified in Court practice, it is only reasonable that precautions provided in supplementary statutes providing remedies for failure to comply, should also be modified in Court practice to meet the actual situation.

Moreover, Appellee-Defendant's Motion to Dismiss on the ground the Complaint failed to state a cause of action should have been treated as a Motion for Summary Judgment and the Plaintiff-Appellant should have been given a reasonable opportunity to present all material made pertinent to such a Motion under Rule 56, F. R. C. P.

The Appellee proceeded to introduce matters outside the pleading, which incidentally, do not, as Appellee (Defendant) therein alleged, bar Appellant's (Plaintiff's) civil action to recover the forfeiture provided for by 16 D. C. Code 804.

Rule 12 (b) FRCP provides that if on a motion asserting the Complaint fails to state a cause of action upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Matters outside the pleadings were presented and Appellant (Plaintiff) was not accorded the opportunity to oppose the motion by affidavit and deposition, as provided for by Rule 56.

While it is settled that a Court may take judicial notice of its own records in support of a motion to Dismiss, this procedure has in practice been confined to cases involving the same cause of action previously litigated. Odom v. Langston, (D. C. Mo. 1948) 75 F Supp 651; Yudin v. Carroll (D. C. Ark. 1944) 57 F. Supp. 793.

Such evidence would be capable of being considered here if the case below had also been a hearing on a Writ of Habeas Corpus, or if the cause on which Judicial Notice was to be taken was also a civil action for recovery of this same forfeiture.

And while Appellant will not contest the taking of Judicial Notice of the Court's findings of fact on hearing of the Writ of Habeas Corpus, Judicial Notice should not be taken of the conclusions of law-where the cause became unappealable because of transfer of the person of Appellant. There is no Appeal from Dismissal of a Writ of Habeas Corpus where the person to whom the Writ was directed no longer has custody of the Petitioner, and hence, in a certain sence, the Civil Action for forfeiture instituted by Appellant is his only remedy.

While the findings of fact are taken as established, the conclusions of law are suscepible to scrutiny and to a different interpertation by a reviewing Court.

This cause of action does not depend on Dismissal of the Writ of Habeas Corpus, nor the reasons therefore, but it lies for Appellee's failure to produce the Appellant, and whether he should suffer a forfeiture for such admitted failure.

Such a case involves a separate and distinct statutory cause of action and is not the same as a Writ of Habeas Corpus. Determination of the hearing on the Writ does not preclude this action nor act as res judicata on the allegations of the Complaint. That the Writ of Habeas Corpus was dismissed does not determine Appellee's liability to Appellant for failure to return and produce the Appellant.

Accordingly, the Motion to Dismiss should not have been granted since the Complaint did state a good cause of action relying only on true facts, which must be considered most favorable to Appellant; or, the Motion to Dismiss should have been treated as a Motion for Summary Judgment and Appellant should have had the opportunity to present material under Rule 56. It was, therefore, error for the Court below to have granted the Motion in either event.

6. THE COURT BELOW SHOULD HAVE PROVIDED THE APPELLANT, PROCEEDING IN FORMA PAUPERIS, A TRANSCRIPT OF THE HABEAS CORPUS PROCEEDINGS AND IT WAS ERROR TO DENY THE APPELLANT SUCH A TRANSCRIPT.

The Appellant made proper application below for a transcript of the proceedings in Whittington v. Cameron H. C. 391-62, in order to secure evidence to be used in his civil action for recovery of the forfeiture. Such a transcript was denied and Appellant contends such denial was in violation of 28 U. S. Code 1915 and in violation of his right to Due Process as secured by the Fifth Amendment to the United States Constitution.

When the Court allows a pauper to prosecute a matter under 28 U S C 1915, it is meaningless, if the same Court denies the pauper a transcript without which he is unable to secure evidence to substantiate his claim.

It is settled that the Court need not supply a pauper with a transcript when he merely seeks to determine whether or not he wishes to engage in litigation, but once the pauper has indeed commenced litigation, by leave of the Court, then to deny him the source of evidence necessary to prosecute this claim is a denial of Due Process.

"An indigent cannot obtain a free transcript of trial merely for his examination in order to determine whether he wishes to engage in litigation, but the District Court can furnish an indigent with a transcript for the purpose of instituting a collateral attack on a criminal proceeding when the indigent has stated a proper ground for relief and a transcript is indespensible." United States v. Glass (N. C. Circ. 1963) 317 F 2d 200.

In all fundamental fairness, once to allow a pauper to sue, the Court should also provide him with a transcript where such transcript is necessary for the pauper to prosecute his claim.

Leave is not given to a pauper to file a civil action unless a good claim can be shown. But then to deny the same pauper the opportunity to prove that same good claim, is to make any such right to sue a hollow right indeed. Our courts do not indulge in meaningless gestures. But the entire grant to sue in forma pauperis becomes a "meaningless gesture" when the ability to prosecute the "good" claim is denied.

The Court has the power to furnish the requested transcript. When discretion is abused by refusing to exercise this power in favor of a pauper whom the Court has already determined has a good cause of action; then such denial is a breach of that fundamental fairness inherent in the concept of ordered liberty, which constitutes Due Process.

CONCLUSION

Appellant respectfully requests that this Court should reverse the Judgment of the District Court and remand with instructions to enter judgment in the amount of $500.00, or alternatively, instruct the District Court to furnish the transcript sought and grant a trial on the merits.

Daniel I. Sherry
Counsel for Appellant,
appointed by this Court
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Washington, D. C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellant was delivered by hand, to the office of the United States Attorney for the District of Columbia, U. S. Court House, Washington, D. C., this 23rd day of September, 1964.

Daniel I. Sherry

BRIEF FOR APPELLEE

IN THE

United States Court of Appeals For the District of Columbia Circuit

No. 18,808

MAURICE N. WHITTINGTON, *Appellant*,

v.

DALE C. CAMERON, Superintendent, St. Elizabeths Hospital, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
ELLEN LEE PARK,
Assistant United States Attorneys.

PETER S. SMITH,
Attorney, Department of Justice.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1) Whether the District Court correctly dismissed appellant's complaint for failure to state a claim on which relief could be granted.

2) Whether the court erred in denying appellant's application for a transcript of a proceeding in a different case.

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TABLE OF CASES

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IN THE

United States Court of Appeals For the District of Columbia Circuit

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No. 18,808

MAURICE N. WHITTINGTON, *Appellant,*

v.

DALE C. CAMERON, Superintendent, St. Elizabeths Hospital, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal from an order dismissing appellant's complaint which sought a forfeiture under 24 D. C. Code 302. Notice of appeal was timely filed on June 3, 1964.

While serving a jail sentence in the District of Columbia jail, appellant was admitted to St. Elizabeths Hospital on May 9, 1960 by order of the director of the Department of Corrections of the District of Columbia, pursuant to 24 D.C. Code 302, as a prisoner who became mentally ill while

serving a sentence. On September 19, 1962 appellant filed an application for a writ of habeas corpus in the United States District Court alleging that his confinement at the hospital was unlawful in that his transfer from the District of Columbia jail was invalid. The petition was styled *Whittington* v. *Overholser*. An order to show cause why the writ should not be issued was made returnable in seven days and served upon Dr. Overholser, director of St. Elizabeths Hospital on September 21, 1962. On October 1, Dr. Overholser filed a return and answer which (1) admitted confinement of appellant (2) denied illegality of the confinement and (3) stated that appellant was suffering from schizophrenic reaction, paranoid type, but that the "symptoms of his mental illness are very largely in remission at the present time and it is the opinion of the respondent that the petitioner has recovered sufficiently from his mental illness so as not to require further care and treatment in a mental hospital, and recommendation to this effect has been made." On October 1 appellant was transferred from St. Elizabeths Hospital to the District of Columbia jail.

The District Court ordered that a writ of habeas corpus issue on October 1, 1962. The writ was served on Dr. Overholser on October 2. Three days later he filed a supplemental return and answer, stating that (1) pursuant to his recommendation, appellant had been transferred to the District of Columbia jail and (2) he did not, therefore, have custody of appellant.

Pursuant to the District Court order of October 1, 1962, a hearing was held on the petition for writ of habeas corpus on October 8. Appellant was represented by counsel at this hearing. On October 15 the District Court dismissed the petition on grounds that appellant was not in the custody of Dr. Overholser but was legally in the District of Columbia jail. *Whittington* v. *Overholser,* H.C. No. 391-62.

On October 4, 1962 Dr. Overholser retired as director of St. Elizabeths. His successor, Dale Cameron, became director on October 9, 1962.

On September 26, 1963 appellant instituted a civil action in the District Court to recover a forfeiture provided by 16 D.C. Code 804. In his complaint appellant alleged that Dale Cameron "did neglect and refuse to bring the body of the complainant before this honored court . . . " on October 8, 1962 in response to a writ of habeas corpus and that appellee should therefore be required to forfeit $500 pursuant to 16 D.C. Code 804.

On December 23, 1963 appellant submitted an application for leave to obtain the transcript of the habeas corpus proceedings in *Whittington* v. *Overholser, supra,* without prepayment of cost. On January 6, 1964 the District Court denied appellant's application for the transcript.

Appellant's complaint was dismissed on April 7, 1964 on the ground that it failed to state a claim on which relief could be granted; the order of dismissal was filed on April 16. Notice of appeal was filed in this Court on June 3, 1964. Appellant's petition to this Court for leave to prosecute an appeal without prepayment of costs was granted in an order filed July 22, 1964.

STATUTE INVOLVED

Title 16, District of Columbia Code, Section 804, provides:

> If any officer or other person to whom a writ of habeas corpus may be directed shall neglect or refuse to make return thereof, or to bring the body of the person detained, according to the command of the writ, he shall forfeit to the person detained the sum of five hundred dollars, and besides shall be liable to attachment and punishment as for a contempt.

SUMMARY OF ARGUMENT

Assuming that appellant's transfer to the District Jail on October 1, 1962 did create a cause of action under 16 D.C. Code 804, the action was against Dr. Overholser, not against appellee. Since appellant sued the wrong party, the action was properly dismissed.

Whether or not appellant sued the correct defendant, he has stated no claim on which relief can be granted. 16 D.C.C. 804 provides for a forfeiture of $500 only when a person to whom a writ of habeas corpus is directed neglects or refuses to make a return or refuses to produce the body of the person detained when commanded to do so by the writ. The record of the habeas corpus proceeding in the *Whittington* v. *Overholser, supra,* which the District Court could judicially notice, shows that respondent in that action did make a return on the writ. The record further shows that respondent in that action no longer had custody of petitioner when the writ ordering that the body be brought before the court was served on respondent. Since respondent did not have custody of the body of the person detained when ordered to deliver up the body, it follows as a matter of law that respondent in that action could not be liable for the penalty provided in 16 D.C.C. 804.

Appellant's contention that the District Court committed error in refusing his application for a transcript of the proceedings in *Whittington* v. *Overholser, supra,* is of no substance. There is no constitutional right that a plaintiff in a civil action be given, at no expense to him, a transcript of a proceeding in a different case.

ARGUMENT

I. The District Court correctly dismissed appellant's complaint for failure to state a claim on which relief could be granted.

A. When appellant petitioned for a writ of habeas corpus in September of 1962, the Superintendent of St. Elizabeths Hospital was Dr. Winfred Overholser. The order to show cause why the writ should not issue and the writ ordering that Whittington be brought before the court were directed to Dr. Overholser. If, as appellant

contends, he was transferred to the District Jail in order to evade the writ, and if in fact 16 D.C. Code 804 does create a cause of action in such circumstances, the action is against Dr. Overholser, not against Dale Cameron who succeeded Overholser as Superintendent. Section 804 speaks in terms of "any officer or other person to whom a writ of habeas corpus may be directed . . . ." It is perfectly plain from this language that the statute seeks to create a personal liability. This is consistent with the historic purpose of this provision which was to insure that no individual, whether he be an officer or a private citizen, would arbitrarily flout the commands of the Great Writ.

Plainly the instant action was improperly brought against Dale Cameron. It is, however, too late to sue the correct party. 12 D.C. Code 201 provides that actions to enforce statutory forfeitures must be brought within one year after the action accrues. Assuming the validity of appellant's contentions, the action would have accrued on October 1, 1962, the day Dr. Overholser transferred appellant to the District Jail. The one year period for bringing the action expired October 1, 1963.

Appellant cannot seek to avoid the effect of the statute of limitations by merely seeking leave to amend the complaint. It is well established that "if the effect of the amendment is to substitute for the defendant a new party, . . . such amendment amounts to a new and independent cause of action and cannot be permitted when the statute of limitation has run." *Kerner* v. *Rackmill,* 111 F. Supp. 150 (N.D. Pa. 1953); *Accord, Hoffman* v. *Halden,* 268 F. 2d 280 (C.A. 9 1959); *Hammond-Knowlton* v. *United States,* 121 F. 2d 192 (C.A. 2 1941); *Grummit* v. *Sturgeon Bay Winter Sports Club,* 197 F. Supp. 455 (E.D. Wis. 1961), *aff'd* 304 F. 2d 98 (C.A. 7 1962); *Harris* v. *Stone,* 115 F. Supp. 531 (D.C. 1953); *Messelt* v. *Security Storage Co.,* 14 F.R.D. 507 (D. Del. 1953).

B. Assuming that appellant sued the correct defendant, he has stated no claim on which relief could be granted. 16 D.C. Code 804 provides that a person to whom a writ of habeas corpus is directed shall forfeit $500 to the person

detained if either of the following situations arise: (1) that the person neglects or refuses to make return of the writ, or (2) that the person neglects or refuses to bring the body of the person detained before the court according to the command of the writ. The record of the proceedings in *Whittington* v. *Overholser, supra,* show that respondent in that action filed a return and answer on October 1, 1962. Thus, appellant could not and does not argue here that 16 D.C. Code 804 was violated by a failure or refusal to make a return on the writ.

Appellant does argue, however, that the second portion of 16 D.C. Code 804 was violated, namely the failure to bring the body of the person detained according to the command of the writ. Appellant concedes, and the record in *Whittington* v. *Overholser, supra,* clearly reveals, that appellant was no longer at St. Elizabeths Hospital when the writ ordering appellant's body to be brought before the court was served on Superintendent Overholser.[1] Since Overholser did not have custody of appellant when the writ was delivered, he could not possibly have produced the body. Hence, he did not violate the second provision of 16 D.C. Code 804.

Appellant seeks to avoid this inevitable conclusion by suggesting a novel construction of section 804. He urges that the order to show cause should be considered as the writ itself. Under this construction, appellant goes on to argue, the failure to deliver up the body of appellant at the time the show cause order was issued was a violation of the command of the writ itself. Hence, appellant concludes, the provision of section 804, which forbids dis-

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[1] Appellant suggests that it was improper for the Court below to take judicial notice of the records in *Whittington* v. *Overholser, supra.* Appellant states that the practice of taking judicial notice has been confined to cases involving the same cause of action previously litigated. The law of this circuit, however, is that a court may take judicial notice of other cases involving "the same subject matter *or* questions of a related nature . . ." (Emphasis supplied.) *Fletcher* v. *Evening Star Newspaper Co.*, 103 U.S. App. D.C. 183, 133 F.2d 395 (1942); *Accord, Lark* v. *West*, 182 F. Supp. 794 (D.C. 1960), *affirmed*, 110 U.S. App. D.C. 157, 289 F.2d 898, *cert. denied*, 368 U.S. 865 (1961).

obeying the command of the writ, was violated by the respondent in *Whittington* v. *Overholser, supra.*

Such an interpretation of section 804 is wholly inconsistent with the very words of the statute and would lead to absurd results. Obviously the order to show cause and the writ are not one in the same. To so argue is to suggest that each person who has been served with an order to show cause in the thousands of habeas corpus actions brought each year has violated the law by merely making an answer and return rather than delivering up the body to the court.

The construction of section 804 which appellant urges on this Court is not only not a strict one but is rather a complete rewriting of the statute. Yet appellant concedes in his brief that a statute imposing a forfeiture should be construed strictly. In *United States* v. *One Ford Coach,* 307 U.S. 219 (1939), the Supreme Court stated: "Forfeitures are not favored; they should be enforced only when within both letter and spirt of the law." Similarly in *Washington Publishing Co.* v. *Pearson,* 306 U.S. 30 (1939), the Court held that "forfeitures are never to be inferred from doubtful language." And in *Farmers and Mechanics National Bank* v. *Dearing,* 91 U.S. 29 (1875), the Court concluded: "When either of two constructions can be given to a statute, and one of them involves a forfeiture, the other is to be preferred." In cases involving forfeiture provisions identical to the one provided in section 804, the courts have been unanimous in holding that the provisions should be strictly construed. *Goetz* v. *Black,* 256 Mich. 564, 240 N.W. 94 (1932); *Stewart* v. *Fuson,* 152 Ky. 137, 153 S.W. 247 (1913); *Beyer* v. *Vanderkuhlen,* 48 Wis. 320 (1880); *Schofield* v. *Root,* 12 Phila. 333 (1878); *Hecker* v. *Jarett,* 1 Bin. 374 (Pa. 1808).

Although there are few cases which have fact situations similar to the instant one, they unanimously support the proposition that lack of custody over the relator in a habeas corpus proceeding is a complete defense to a writ ordering the relator to be brought before the court or to a subsequent action for attachment or recovery of a statutory forfeiture. It is of no significance that the person to

whom the petition for the writ is directed gives up custody of the relator subsequent to the filing of the petition. The key question in each case is whether the person to whom the writ is directed has custody of the relator at the time he is ordered to bring the relator before the court. In *Ex parte Shaudies*, 66 Ala. 135 (1881), the sheriff, in his return, stated that, subsequent to the filing of the petition for writ of habeas corpus, he had delivered the relator to the court of county commissioners since the relator had been convicted in county court. The Supreme Court of Alabama held that the lower court was correct in refusing to order the sheriff to produce the relator since the return showed that the relator "was not then in his [the sheriff's] custody, or under his power and control, ..."

In *Commonwealth* v. *Kirkbride*, 1 Brewster 541 (Phil. Ct. of Common Pleas 1868) a writ of habeas corpus was issued on January 27, 1868 returnable two days later. The relator had been in a mental hospital since 1865. The return stated that the relator was discharged the day the return was filed under the belief that he was sufficiently cured of his mental illness. The Court held that there was no attempt to evade the return and thus refused to permit attachment of the defendant's property. The Court stated: "The moment the patient in such a case is cured he is entitled to his liberty and if his keeper is satisfied of the restoration to reason before the return day of the writ, how can he detain him longer?"

In *Rex* v. *Wright*, 2 Strange 915, 93 Eng. Rep. 939 (1731), a mental patient filed a petition for a writ of habeas corpus. The physician who was caring for him made no return and a writ was subsequently issued and an attachment was sought. The physician then made a return in which he stated that before the writ had been served on him, he had delivered the relator to her husband and did not know the relator's whereabouts. The Court held that this was a sufficient answer. See also *Fuson* v. *Stewart*, 137 Ky. 748, 126 S.W. 1097 (1910).

Perhaps recognizing the inapplicability of section 804 to the facts of this case, appellant in his brief to this Court

has sought to introduce a new issue. Appellant now suggests that, at a minimum, section 804 should apply when the person to whom the writ is directed deliberately, wilfully and in bad faith seeks to evade the writ by transferring the relator. Appellant then argues that he should have been given a trial on the merits on the question of appellee's bad faith.

No such allegation of bad faith was made in the District Court and appellant is foreclosed from raising this issue here. It is settled that questions of fact not raised in the District Court cannot later be raised on appeal. *Hormel* v. *Helvering,* 312 U.S. 552 (1941); *Madison* v. *Phillips,* 103 U.S. App. D.C. 11, 254 F. 2d 348 (1958); *American Air Export and Import Co.* v. *O'Neill,* 95 U.S. App. D.C. 274, 221 F. 2d 829 (1954); *Keyes* v. *Madsen,* 86 U.S. App. D.C. 24, 179 F. 2d 40 (1949); *Carr* v. *City of Anchorage,* 243 F. 2d 482 (C.A. 9, 1957); *Demelle* v. *Interstate Commerce Commission,* 219 F. 2d 619 (C.A. 1, 1955), *cert. denied,* 350 U.S. 824 (1955); *Shafer* v. *Reo Motors Inc.,* 205 F. 2d 685 (C.A. 3, 1953); *United States* v. *Herschmann,* 163 F. 2d 865 (C.A. 7, 1947).

II. The court below did not err in denying appellant's application for a transcript of the habeas corpus proceedings in Whittington v. Overholser.

Appellant argues that the denial of his motion for a transcript of the proceedings in *Whittington* v. *Overholser, supra,* was in violation of 28 U.S.C. 1915 and the due process clause of the Fifth Amendment. Neither of these provisions have been held to give a plaintiff in a civil suit the constitutional right to demand a transcript of a proceeding in a completely different case. Subsection 1915(b), which permits the court in its discretion to direct that a stenographic transcript be supplied at government expense, refers only to a "stenographic transcript of the proceedings had at the trial of the case which the court of appeals is presently reviewing." *Taylor* v. *United States,* 238 F. 2d 409 (C.A. 9, 1956), *cert. denied,* 353 U.S. 938 (1957). Furthermore, even in an action brought for the purpose

of making a collateral attack on a criminal proceeding, an indigent is deprived of no right by a refusal to furnish him transcript of the prior proceeding "absent some indication that a transcript would disclose matter relevant to the questions sought to be raised. . . ." *United States* v. *Glass*, 317 F. 2d 200 (C.A. 4, 1963).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the District Court should be affirmed.

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REPLY BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term 1964

No. 18,808

MAURICE N. WHITTINGTON

Appellant,

v.

DALE C. CAMERON, Superintendent
Saint Elizabeth's Hospital

Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF COLUMBIA

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TABLE OF CASES

SUMMARY OF ARGUMENT

I. Since the acts constituting this cause of action were perpetrated by Dr. Overholser in his official capacity as Superintendent of Saint Elizabeth's Hospital, and fell within the scope of his official duties, the liability incurred to the official not the private individual, and can be maintained against his successor in office.

II. The remedial provisions of 16 D. C. Code 804 should be held applicable to Appellee since:

1. Judicial approval of the actions of federal officials in transferring a petitioner out of their custody would enable these officials to completely thwart the D. C. habeas corpus statutes and deprive a petitioner from ever receiving a judicial inquiry into the legality of his confinement----------

2. Lack of custody of a habeas corpus petitioner is not an absolute defense to 16 D. C. Code Section 804----------

III. The issue of bad faith can be raised for the first time on appeal since there was no trial on the merits below and Plaintiff-Appellant was not accorded an opportunity to present material revelant under Rule 56. It was not necessary to make such allegations in the Complaint since the Complaint relied on the statute.

. IV. Denial by the District Court of a transcript of the habeas corpus proceeding was error since the case involved the same subject matter or questions of a related nature, and Plaintiff-Appellant indicated that a transcript would disclose matter relevant to the issues sought to be raised.

ARGUMENT

1. Action not improperly brought against Dale C. Cameron, Superintendent of Saint Elizabeth's Hospital.

The manifold inconsistencies of Appellee's brief may be illustrated by the contention, made here for the first time, that 16 D. C. Code, Section 804 creates only a personal liability. Appellee himself cites considerable authority for the proposition that questions of fact not raised in the District Court cannot later be raised on appeal (Appellee's brief p. 11)

Nevertheless, the rule in this Circuit on a public officer's liability is definitive. Cooper v. O'Connor, 1939, 71 App. D. C. 6, 107 F. 2nd 207, cert. denied 60 S. Ct. 263, 308 U. S. 615, 84L. Ed. 514. Cooper v. O'Connor, 1939, 70 App. D. C. 238, 105 F. 2nd 761; and Cooper v. O'Connor, 1938, 69 App. D. C. 100, 99 F., 2nd 135, 118 A. L. R. 1440. All set out and re-iterated the holding that acts of a public officer are performed within the scope of "official duties" if such acts are done in relation to matters committed by law to the officer's control or supervision, or are governed by a lawful requirement of a department under whose authority the officer is acting, and that acts within the

scope of the quoted term "official duties" do not create a personal liability.

The liability therefore created by 16 D. C. Code 804 must relate to the officer in his official capacity, and not individually and personally.

Regardless of the named individual in the writ, it was plainly addressed to the Superintendent of Saint Elizabeth's Hospital. Dr. Overholser retired from office on October 4, 1962. The cause of action sued upon was not perfected until October 8, 1962. The petition was dismissed on October 15, 1962 when Dale Cameron was Superintendent.

While this point does not directly involve Rule 25 (d) of the Federal Rules of Civil Procedure, the spirit of that Rule, and the reasons for its adoption are applicable here. In addition, Appellee has been named throughout these pleadings as "Superintendent of Saint Elizabeth's Hospital" and Rule 25 (d) (2) would have permitted Appellant to simply name the Defendant as "Superintendent of Saint Elizabeth's Hospital" without indicating the proper name of the party presently occupying that post.

It is therefore plain that the cause of action herein was not improperly brought against Dale C. Cameron, Superintendent of Saint Elizabeth's Hospital.

11. 16 D. C. Code 804 should be held applicable to Appellee

The Appellee is further inconsistent when he insists that the District Court should take judicial notice of the records in Whittington vs. Overholser , H. C. 391-62, because that case involved "the same subject matter or questions of a related nature ..." (footnote 21, p. 10, Appellee's brief), while he also maintains (on page 13) that Appellant is not entitled to a transcript because Whittington vs. Overholser (supra) is "a completely different case." (Emphasis supplied)

Appellee further maintains that Appellant's interpretation of 16 D. C. Code 804 is "wholly inconsistent with the very words of the statute," while remaining impressively silent on the inconsistency of the practical application of 16 D. C. Code 801 with the wording of that statute requiring that a writ shall issue "forthwith".

Appellee next cites several cases, none of which involve a civil action on a statutory forfeiture, intended to penalize an officer who causes the petitioner to be denied judicial inquiry into the legality of his confinement, by failing to make timely return to an order to show cause why a writ should not issue, and by subsequently transferring the petitioner out of his custody, knowing

that a habeas corpus proceeding was pending.

As Appellant has previously pointed out, judicial approval of the actions of the Superintendent would permit officials to completely ignore the District of Columbia habeas corpus statutes by simply transferring any petitioner from D. C. Jail to Lorton, to Saint Elizabeth's and back to D. C. Jail every time a petition for a writ is filed.

Such a violation of constitutional due process cannot be tolerated by this Court and Appellant strongly urges this Court to ensure that such practices shall not proceed unthwarted, by enforcing the remedial provisions of Section 804 against this Appellee.

III. Issue of bad faith not precluded from consideration.

In the alternative, Appellant presents to the Court's consideration the theory that since Section 804 does not mention any exceptions or defenses, that lack of custody is not an absolute defense. The Plaintiff-Appellant should therefore be entitled to a trial wherein the reason for lack of custody may be reviewed to determine whether or not the lack of custody was a culpable deprivation of the Plaintiff-Appellant's rights. While lack of custody is undeniably a sufficient answer to the writ, there is nothing in the statutes indicating that it is an absolute defense to the statutory cause of action. Moreover, it would appear that such was not the intent of Congress, since Section 804 is obviously intended to compliment Section 803 , and both of them supplement Section 801. Section 803 provides a remedy if the petitioner has reason to believe the custodian will attempt to transfer him from custody so as to avoid the writ. If however, the petitioner does not suspect this to be the case and does not avail himself of Section 803, and he is transferred, then his remedy is Section 804, the statutory forfeiture. If it was only intended to apply to a custodian refusing to respond, who still has the petitioner in his custody, attachment and contempt would be sufficient remedy.

Plainly then, the statutory forfeiture was designed to apply where lack of custody is involved.

Moreover, this issue can be raised here since there never was a trial in the Court below. The Complaint was dismissed on Defendant-Appellee's Motion; no testimony was taken and no evidence was heard on Plaintiff-Appellant's behalf. No allegation of bad faith need have been made in the Complaint, since the Complaint stated a statutory cause of action relying on the forfeiture provided, and indicated the circumstances out of which the cause of action arose. That such a Complaint is sufficient is undeniable.

Appellee's contention, however, does bolster the Appellant's argument ~~agreement~~ that Defendant-Appellee's Motion to Dismiss should have been considered as a Motion for Summary Judgment and Plaintiff-Appellant should have been accorded the opportunity to produce evidence in support of his Complaint. The Court did consider matters outside the pleadings but Plaintiff-Appellant was not allowed to present material under Rule 56, Federal Rules of Civil Procedure.

Had he been allowed that opportunity, and not raised all issues, Appellee would have some justification for maintaining that the issue could not now be raised. But Appellant had no such opportunity and the issue is not precluded from consideration here.

IV. Denial of transcript was error.

Finally, the Appellee argues that denial of a transcript was not error since:

1. The proceeding was a completely different case;

2. There was no indication that a transcript would disclose matter relevant to the questions sought to be raised.

In respect to 1, this was, admittedly a different case, but the cause of action was based primarily on the failure of the Defendant-Appellee to produce the Plaintiff-Appellant on the return day of the writ. The Appellant in his own brief earlier argues that he cases involve the same subject matter or questions of a related notice,

And in respect to 2, the Plaintiff-Appellant's request for a transcript plainly indicated that he required the transcript for use as evidence in the civil proceeding. Since the cause of action was based primarily on what took place on that date and at the hearing on the writ, it is obvious that the transcript must contain matter relevant to the questions sought to be raised.

CONCLUSION

For the foregoing reasons, in addition to the arguments presented in Appellant's brief, the Appellant respectfully requests that this Court should reverse the Judgment of the District Court and remand with instructions to enter Judgment in the amount of $500.00, or alternatively instruct the District Court to furnish the transcript sought and grant a trial on the merits.

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Washington, D. C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Appellant was delivered to the Office of the United States Attorney for the District of Columbia, U. S. Court House, Washington, D. C., this 13th day of November, 1964.

Peter J. Dooley, Jr.